80-232

Supreme Court, U. S.
FILED
AUG 9 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1980
No.

UNITED STATES OF AMERICA,
Respondents,
v.
RICHARD MARCHESE,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Certiorari should be granted in this case to determine whether the decision by the Court of Appeals is in conflict with the decision of Fifth Circuit in *U.S. v. Kessler* and the Eighth Circuit in *U.S. v. Martin.*

II. Whether Certiorari should be granted in this case to determine whether the decision by the Court of Appeals is in conflict with the decisions by this Court in *U.S. v. Jorn* and *U.S. v. Dinitz.*

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW 1

REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. The Decision of The Court of Appeals Is In Conflict With The Decision of The Fifth Circuit In *U.S. v. Kessler* and The Eighth Circuit in *U.S. v. Martin* 8

II. The Decision of The Court of Appeals Is In Conflict With The Decision of This Court In *U.S. v. Jorn* and *U.S. v. Dinitz* 10

APPENDIX

Page

A) Oral Opinion of District Court of August 24, 1979, denying Motion to Dismiss With Prejudice 1A

B) Written Order of District Court of August 27, 1979, denying Motion to Dismiss With Prejudice 3A

C) Judgment Order of United States Court of Appeals for the Third Circuit of April 24, 1979, affirming District Court 4A

D) Order of United States Court of Appeals for the Third Circuit of June 10, 1980, denying Petition for Rehearing 5A

TABLE OF AUTHORITIES

CASES

Page

Green v. United States, 355 U.S. 184 (1957) 10

United States v. Dinitz, 424 U.S. 600 (1976) 8, 10, 11

United States v. Jorn, 400 U.S. 470 (1971)..... 8, 10, 11

United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976) . 8

United States v. Martin, 561 F.2d 135 (8th Cir. 1977)... 8

STATUTES

18 U.S.C.A. §371 ..... 2, 7

18 U.S.C.A. §472 ..... 2, 7

28 U.S.C.A. §1254 (1)..... 1

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REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

OPINION OF THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA:

The opinion of the Honorable Donald E. Ziegler, was made orally in response to Petitioner's written motion for dismissal with prejudice on August 24, 1979, and is contained in the appendix hereto.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

The Third Circuit, at No. 79-2272, in a Judgment Order issued April 24, 1980, affirmed the judgment of the District Court. This judgment order is contained in the appendix hereto.

JURISDICTION

The judgment sought to be reviewed by this court was issued by the Court of Appeals on April 24, 1980.

The determination of the Court of Appeals denying Petitioner's request for rehearing was made on June 10, 1980.

Jurisdiction to this Court to review the determination of the United States Court of Appeals for the Third Circuit is

given by 28 U.S.C. §1254(1). This petition is being made by the defendant in the cause below, a party to the said action.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V. DOUBLE JEOPARDY

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,. . .

STATEMENT OF THE CASE

On March 20, 1979, the Petitioner Richard Marchese was charged in a four count indictment with one count of conspiring to possess, conceal, pass, utter and publish counterfeit bills, (18 U.S.C. §371) and three counts of the substantive offense of possessing, concealing, etc., counterfeit obligations. (18 U.S.C. §472)

Count three of the indictment alleges that on February 5, 1979, the Petitioner passed a counterfeit $100 bill at Young's Red and White Food Market in Altoona, Pa. Count four alleges that on the following day, Petitioner passed four counterfeit $100 bills to one Frederick Herrmann.

The case proceeded to trial before the Honorable Donald E. Ziegler on July 2, 1979. The jury was sworn on July 3, 1979, and after preliminary comments by the Court, the government, via Assistant U.S. Attorney Thomas Crawford, was permitted to open to the jury. In the government's opening, Mr. Crawford, in relation to count three, informed the jury that the Petitioner entered Young's Red and White Market and "handed the girl" a counterfeit $100 bill in payment for some groceries. He then went on to inform the jury, in reference to count four of the indictment, that on the following day, Petitioner Marchese gave one Frederick Herrmann four counterfeit one hundred dollar bills in exchange for a gold coin, and that Mr. Herrman deposited

these in his bank. Mr. Crawford then advised the jury that the counterfeit $100 bill that Petitioner allegedly passed on February 5 in the grocery store and the four he allegedly passed to Frederick Herrmann were published and *printed at the same source.*

Mr. Crawford also informed the jury that "there were a number of other similar passes in the same area as Young's Red and White grocery store on the 5th of February, 1979." Crawford went on to say:

> But there is some distinctive things about Mr. Marchesé which was noticed by a number of people who received these bills; one of which, in particular, is that Mr. Marchese is missing a number of teeth. Now you won't see that here today. We'll have testimony about that. And this was a common thing noticed by a number of the people who received notes from Mr. Marchese.

Counsel for Petitioner then opened to the jury. Prior to the testimony of the first witness, the government gave a copy of relevant "Jencks" material to the Petitioner.

The government began its case by attempting to prove count four of the indictment—the alleged passing of four counterfeit $100 bills to Frederick Herrmann on February 6, 1979, by calling bank employees where the four bills were allegedly deposited on February 7, 1979, by Frederick Herrmann.

The government then asked for a sidebar conference at the point it intended to call Frederick Herrmann to the stand who was to presumably testify that the Petitioner passed him the counterfeit bills. U.S. Attorney Crawford then informed the Court that he (Crawford) had only moments earlier been informed by Herrmann's attorney that Herrmann intended to assert his right under the Fifth Amendment to remain silent.

In the course of discussing Mr. Herrmann's Fifth Amendment privilege, however, it became clear that the government had been contacted by Mr. Herrmann *the previous evening* at which time he informed the government that he wished to take the Fifth Amendment. This was testified to both by Mr. Herrmann himself and Secret Service Agent Dana Brown who was the agent in charge of the case.

Brown testified under oath that Herrmann had told him that he, upon the advice of counsel, was going to take the Fifth. Brown specifically testified that while Herrmann told him that he had some fear about testifying, independent of any fear he had, he planned to take the Fifth Amendment.

While Asst. U.S. Attorney Crawford, in argument and not under oath, claimed that Herrmann had only told Agent Brown the preceeding night that he was "afraid for his life," this was not true according to Brown. Herrmann had informed him that he desired to take the Fifth. The Court, after a colloquy, granted Herrmann's request to take the Fifth.

Further, Asst. U.S. Attorney Crawford attempted to obtain immunity for Herrmann and failed to do so in a timely fashion as required by the Court. But in discussing the question of immunity, Mr. Crawford made it clear to the Court that it would probably take perhaps two weeks to receive the grant. The government, therefore, opened to the jury and advised them of Fred Herrmann's potential testimony regarding the Petitioner knowing that the witness was planning to plead the Fifth Amendment and knowing that immunity would not be immediately granted.

This reference by the government to the witness who would testify as to a passing of the bills by Petitioner on February 6 when it knew that the witness was planning to

invoke his Fifth Amendment privilege, is particularly significant when it is taken into account that another count of the indictment alleged a passing by petitioner of a counterfeit bill made from the same plate the night before.

In addition, Asst. U.S. Attorney Crawford thereafter attempted to call as witness Dianne Altman and Joan Baroski. These two witnesses were the persons referred to by Crawford in his opening who allegedly would testify that the Petitioner passed them counterfeit bills on the same day and in the same area as the bill he was alleged to have passed on February 5, 1979, at a Red and White market. These were the witnesses who allegedly would testify that Petitioner, who has false teeth, took out his teeth to pass these bills.

However, counsel for defense, aware that neither of these two witnesses could identify Petitioner as the man who passed these bills, having so learned from the "Jencks" material that the government gave to the defense, requested offer of proof. The government also knew that these witnesses had not been able to identify the Petitioner.

Petitioner, in addition, was not even charged with passing those particular bills. The Court refused to allow either witness to testify.

At the close of the government's case, upon its failure to produce Frederick Herrmann as a witness, counsel for Petitioner made a Motion for Judgment of Acquittal as to counts one and four (conspiracy and passing to Fred Herrmann), which was granted.

Counsel for Petitioner then requested a mistrial as to counts two and three by virtue of the government's reference in its opening to the jury to the testimony of Fred Herrmann, who it knew was planning to take the Fifth and by virtue of its reference in its opening to others who would identify the Petitioner as removing his false teeth and passing

counterfeit bills to them, when it knew those others could not identify the Petitioner. Counsel also requested that the government grant a dismissal with prejudice.

The Court thereupon granted the motion of Petitioner for mistrial, but did not dismiss the charges.

Shortly thereafter, counsel for Petitioner filed a written motion to dismiss with prejudice alleging that the mistrial was attributable to prosecutorial overreaching and that jeopardy therefore should attach.

An argument was held on that motion on August 24, 1979, before Judge Ziegler, at which time the Court orally denied the relief sought by Petitioner. A written order denying same was handed down by the Court on August 27, 1979.

Petitioner appealed the ruling of the District Court denying the dismissal with prejudice to the United States Court of Appeals, which affirmed the District Court's order on April 24, 1980. Petitioner sought rehearing which was denied on June 10, 1980.

The basis for federal jurisdiction in the court for first instance was an alleged violation of federal criminal statutes. (18 U.S.C. §371, 472)

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT IN *U.S. V. KESSLER*[1] AND THE EIGHTH CIRCUIT IN *U.S. V. MARTIN*[2]

In the instant matter, Petitioner sought below to bar a retrial under principles of double jeopardy in a situation where he himself requested a mistrial. While Petitioner is

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[1] *U.S. v. Kessler*, 530 F.2d 1246 (5th Cir. 1976)

[2] *U.S. v. Martin*, 561 F.2d 135 (8th Cir. 1977)

aware that under ordinary circumstances a defendant's request for a mistrial removes any constitutional barrier to a retrial, this rule is by no means an inflexible one. In *U.S. v. Jorn*, 400 U.S. 470 (1971) at 485, the Supreme Court held that where "prosecutorial overreaching" exists, the mere fact that the defendant requested a mistrial does not remove the double jeopardy barrier to a retrial.

While the Supreme Court has never clearly defined "prosecutorial overreaching", it is clear that at a minimum, it bars retrial where the underlying error is "motivated by bad faith or undertaken to harass or prejudice" the defendant. *United States v. Dinitz*, 424 U.S. 607, 611 (1976), or is intended to provoke mistrial requests. *Dinitz, supra*, at 611.

In the Fifth Circuit case of *U.S. v. Kessler, supra*, at 1256, and in the Eighth Circuit case of *U.S. v. Martin, supra*, at 140, both courts, in efforts to define "prosecutorial overreaching" have held that if the government's conduct leading to the mistrial constitutes "gross negligence", then a retrial would be barred.

In the matter now before this Court, the District Court in denying Petitioner's motion for dismissal with prejudice applied a test which placed on the defendant "the burden of proving an intentional act by the government." (2A) The District Court goes on to find that the government engaged in no such intentional act.

The Third Circuit, which in its judgment order affirmed the lower court's ruling, tacitly adopted this "intentional misconduct" test as the basis for determining when double jeopardy would apply to bar a retrial following the granting of a defendant requested mistrial.

While the Petitioner continues to maintain that the blatant and inexcusable conduct demonstrated by the government in the instant matter as set forth more fully in the statement of the case, *infra*, does constitute intentional mis-

conduct, at the very least the conduct constitutes gross negligence—the standard adopted by the Fifth and Eighth Circuits.

Inasmuch as a clear conflict among the Circuit exists as to when a retrial should be barred following a defense motion for mistrial which is granted, Petitioner herein respectfully requests that a writ of certiorari be granted to resolve this conflict among the circuits.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *U.S. V. JORN*[3] AND *U.S. V. DINITZ*[4]

The trial in the instant matter ended in a mistrial after a motion for same was made by the Petitioner. This motion was prompted by highly prejudicial references by the government in its opening to the jury to the testimony of a key witness who it knew in advance was planning to exercise his right under the Fifth Amendment to remain silent and to the testimony of witnesses who it claimed could identify the Petitioner passing other counterfeit bills when it knew these witnesses in fact could not identify the Petitioner.

After the Court ordered that Fred Herrmann could properly take the Fifth and that the so-called witnesses who couldn't identify Petitioner were not permitted to testify, the mistrial was moved for and granted. The prejudice was obvious in that even though the counts involving witness Fred Herrmann were dismissed pursuant to a motion for acquittal, the remaining counts which were so intertwined with the others could never have gone to the jury without a fatal taint.

In *Green v. United States*, 355 U.S. 184 (1957), Justice Black articulated the basic underpinnings of the double jeopardy clause as follows:

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[3]*U.S. v. Jorn*, 400 U.S. 470 (1971)

[4]*U.S. v. Dinitz*, 424 U.S. 600 (1976)

> The underlying idea, one that is ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility than even though innocent he may be found guilty. 355 U.S. at 187-188.

The double jeopardy clause contemplates the "valued right to have his trial completed by a particular tribunal." *U.S. v. Jorn, supra*, at 484-485.

In both *Jorn* and *Dinitz*, this Court has recognized that in cases of prosecutorial overreaching, the mere fact that the defendant sought the mistrial does not preclude the principle of double jeopardly from barring a retrial.

In the instant matter, the conduct of the prosecutor as described above was so offensive to the concept of due process that no other conclusion can be reached as to the state of mind of the prosecutor than that his conduct was undertaken to harass or prejudice the defendant.

To allow such conduct to merely bring about a mistrial but not bar the government from taking a second shot at the Petitioner, is patently offensive to the clear underpinnings of the *Jorn* and *Dinitz* decisions of this Court.

As such, the decision of the Third Circuit, permitting a retrial, decides the question in conflict with the applicable decisions of this Court. That being the case, Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

CARL M. JANAVITZ
PAUL D. BOAS

APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 79-71 Criminal

UNITED STATES OF AMERICA

vs.

RICHARD RALPH MARCHESE,
Defendant

Friday, August 24, 1979
Pittsburgh, Pennsylvania

APPEARANCES

For the Government: THOMAS CRAWFORD, Esquire
Assistant U. S. Attorney

For the Defendant: PAUL BOAS, Esquire

Before: Honorable Donald E. Ziegler, J.

TRANSCRIPT OF OFFICIAL NOTES OF
TESTIMONY TAKEN IN THE
ABOVE-CAPTIONED CASE BY:

Michael D. Powers,
Official Reporter

THE COURT:—the Court finds that this is not a fatal variance, and has granted the government's motion to amend the indictment and, therefore, the motion for a directed verdict of acquittal as to counts two and three will be denied. Next, the defendant has filed a motion to dismiss counts two and three with prejudice for alleged bad faith or intentional overreaching on behalf of the government.

The test is ably set forth, as I have stated, in United States vs. Martin.

We find no such conduct on behalf of the government in this case.

The defendant bears the burden of proving an intentional act by the government. We find no evidence of an intentional act by the prosecutor either in his strategy, opening statement or presentation of the evidence.

Moreover, we do not even find negligence on the part of the prosecutor. And, as Martin observed, although mere negligence by the prosecutor is not the type of overreaching contemplated by Dinitz, if the prosecutorial error is motivated by bad faith or undertaken to harass or prejudice the defendant, then prosecutorial overreaching will be found.

We find that the test has not been met and, therefore, the motion to dismiss counts two and three will be denied.

Are there any other motions which I have not ruled

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 79-071

UNITED STATES OF AMERICA
Plaintiff,

vs.

RICHARD MARCHESE
Defendant.

ORDER OF COURT

AND NOW, this 27th day of August, 1979, in accordance with the bench memorandum dated August 24, 1979,

IT IS ORDERED that defendant's motion to dismiss with prejudice and defendant's motion for directed verdict of acquittal as to counts two and three of the indictment be and hereby are denied.

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

cc: Paul D. Boas, Esq.
1906 Law & Finance Building
Pittsburgh, PA 15219

Thomas Crawford, Esq.
Asst. U.S. Atty.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2272

UNITED STATES OF AMERICA

vs.

MARCHESE, RICHARD
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D. C. Crim. No. 79-00071)

Submitted Under Third Circuit Rule 12(6)
April 24, 1980
Before: ALDISERT, WEIS and GARTH,
Circuit Judges.

Judgment Order

After considering the contention raised by appellant, to-wit, that the double jeopardy clause of the fifth amendment bars retrial of the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ ALDISERT

Circuit Judge

Attest:

/s/ THOMAS F. QUINN
Thomas F. Quinn, *Clerk*
Dated: April 24, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2272

UNITED STATES OF AMERICA,
Appellee

v.

RICHARD MARCHESE,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ WEIS, J.
Judge

Dated: June 10, 1980